FOR ARGUMENT

No. 92-97

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC., COMAIR, INC., MIDWAY AIRLINES (1987), INC., USAIR, INC., AMERICAN AIRLINES, INC., and UNITED AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD OF AERONAUTICS, and THE KENT COUNTY DEPARTMENT OF AERONAUTICS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In their opening brief, the Airlines[1] showed that the fees imposed on them by the Airport are unreasonable under the Anti-Head Tax Act ("AHTA") and the Commerce Clause because (1) the fees allocate *none* of the Airport's airside costs to the concessions, even though the concessions, like the Airlines, benefit enormously from the facilities and services that generate those costs; (2) the fees are designed to, and do, generate revenues that vastly exceed the Airport's costs and produce huge surpluses far beyond any reasonable Airport needs; and (3) the fees deliberately discriminate against the Airlines by charging them their full allocated costs (as calculated by the Airport) but charging general aviation less than one-fifth of its allocated costs.

In response, neither the Airport nor the Solicitor General denies the misallocation of costs, the production of the huge surpluses, or the intentional discrimination. Instead, they both spend the bulk of their briefs contending either that Congress never intended to prohibit unreasonable airline fees *at all* under the AHTA or, if it did, that it did not intend to let the Airlines sue to challenge such fees. They therefore ask the Court to decline to entertain the Airlines' challenge in this case.

The Court should not accede to this request. For as we will show: (1) the Airport's contention that the AHTA does not prohibit unreasonable fees is frivolous and not properly before the Court; (2) its half-hearted attempt to defend the fees on the merits cannot alter the fact that the fees plainly violate all three of the requirements established by this Court in *Evansville*; (3) even if the fees were found reasonable under the AHTA on the ground Congress did not intend for concession fees to be considered under that statute, there is no indication that it intended courts to ignore the effect of such fees under a

[1] For the Airlines' statements pursuant to Sup. Ct. Rule 29.1, see Petition for a Writ of Certiorari at ii.

Commerce Clause analysis; and (4) the Airlines' right to challenge the Airport's fees is not properly before this Court and, even if it were, the Airlines plainly have such a right, whether under the AHTA, the Commerce Clause, the Supremacy Clause, or 42 U.S.C. § 1983.

ARGUMENT

I. THE ANTI-HEAD TAX ACT PROHIBITS UNREASONABLE AIRPORT FEES

In an effort to avoid the merits of this case, the Airport now argues for the first time that unreasonable fees are not prohibited by the AHTA at all. *See* Airport Br. 16-21. Because this argument was not raised below, the Court should decline to consider it. *See, e.g., Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980). In any event, the argument is contradicted by the statute's plain language and its legislative history.

The AHTA bans not only the per-passenger "head taxes" at issue in *Evansville*, but further provides that "[n]o State (or political subdivision thereof . . .) shall levy or collect a tax, *fee*, head charge, or other charge, *directly or indirectly, on persons traveling in air commerce* or *on the carriage of persons traveling in air commerce* . . . ." 49 U.S.C. App. § 1513(a) (emphasis supplied). Under this unambiguous language, the fees at issue are plainly "fee[s]" or "other charge[s]" levied both "indirectly" on "persons traveling in air commerce" and "directly" on "the carriage of persons traveling in air commerce."[2] Such fees would therefore be prohibited altogether by § 1513(a), were it not for the savings clause in § 1513(b). The latter provides that "[n]othing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting *reasonable rental charges, landing*

[2] Congress deemed it irrelevant whether prohibited charges are levied directly on passengers, or indirectly on airlines, because either way "the end result is to raise the cost of air travel." S. Rep. No. 12, 93d Cong., 1st Sess. 22 [hereinafter "Senate Report"], *reprinted in* 1973 U.S.C.C.A.N. 1434, 1451.

fees, and other service charges from aircraft operators for the use of airport facilities" (emphasis supplied).

Thus, the AHTA clearly prohibits all fees on aircraft operators except those that are "reasonable"—that is, it prohibits all unreasonable fees. The Airport's new contrary interpretation both ignores the plain language of § 1513(a) and renders the relevant language of § 1513(b) meaningless.[3] Obviously, if § 1513(a) would not otherwise effectively prohibit *all* fees on aircraft operators, the provision in § 1513(b) excepting certain "reasonable" fees on those operators would be pointless. And even if § 1513(a) did not otherwise prohibit all fees on aircraft operators, Congress' express approval only of "reasonable" fees on such operators cannot be read as anything other than a disapproval of unreasonable fees.[4]

II. THE AIRPORT'S FEES ARE UNREASONABLE UNDER THE ANTI-HEAD TAX ACT

The Airport agrees that the *Evansville* standards govern the reasonableness of its fees, and the Solicitor Gen-

[3] In support of its interpretation, the Airport relies on *New England Legal Foundation* v. *Massachusetts Port Authority*, 883 F.2d 157, 170 (1st Cir. 1989). *See* Airport Br. 18-19. To the extent that case suggested that airline user fees are not within the scope of the AHTA, it is at odds with the First Circuit's own decision in *Interface Group, Inc.* v. *Massachusetts Port Authority*, 816 F.2d 9, 16 (1st Cir. 1987), and conflicts with every other decision to have addressed the issue. *See, e.g.*, J.A. 22 (Sixth Circuit holding); *Indianapolis Airport Auth.* v. *American Airlines, Inc.*, 733 F.2d 1262, 1265 (7th Cir. 1984); *City and County of Denver* v. *Continental Air Lines, Inc.*, 712 F. Supp. 834, 839 (D. Colo. 1989) (there is "no doubt" that § 1513(a) encompasses airline user fees "because they are indirect charges on the carrying of persons in air commerce"); *Rocky Mountain Airways, Inc.* v. *County of Pitkin*, 674 F. Supp. 312, 315 (D. Colo. 1987) (same).

[4] Even the Secretary of Transportation states that the AHTA "require[s] user fees imposed on aircraft operators to be 'reasonable.'" U.S. Br. 11. The Airport asserts that the Secretary has previously embraced its interpretation, and that the Secretary's views are entitled to deference. It suffices to say, however, that the Secretary has *not* espoused the Airport's interpretation in this case.

eral appears to agree as well.[5] Yet nothing in their briefs can justify the fees under those standards.

A. The Airport Unreasonably Overcharges the Airlines For Their Use of Airport Facilities

As the Airport recognizes, under *Evansville* airport users may be charged only for their "fair share" of airport costs (Airport Br. 34) and, as the Solicitor General notes, such costs must be "properly allocated." U.S. Br. 7. This accords with *Evansville*'s requirement that user fees be "based on some fair approximation of use or privilege for use." 405 U.S. at 716-17. Nevertheless, the Airport allocates virtually all of its "air-operations" costs (costs associated with runways, taxiways, and the like) to the Airlines and general aviation and *none* to the concessions, notwithstanding that the concessions are

[5] *See* Airport Br. 32; U.S. Br. 23-29; *see also* Br. of Airports Council Int'l 13. One of the Airport's amici notes that Congress believed that *Evansville* " 'did not sufficiently define the ruling as, for example, what constitutes a reasonable charge . . . .' " Br. of the U.S. Conference of Mayors, *et al.* 15 (quoting Senate Report at 17, 1973 U.S.C.C.A.N. at 1446). Read in context, however, this passage shows only that Congress disagreed with *Evansville*'s specific holding that head taxes were "reasonable" under this Court's precedents. It does not show that Congress contemplated a different legal standard to evaluate the reasonableness of the user fees it expressly *permitted* in § 1513(b), and no party has suggested any standard other than the *Evansville* test.

The Airport contends that the determination of "reasonableness" under the AHTA is a finding of fact subject to the "clearly erroneous" standard of review. Airport Br. 36. This is clearly wrong. The *facts* relating to the Airport's fees are undisputed and, as with the Commerce Clause challenge in *Evansville*, whether those fees are "reasonable" is a question of law for this Court. *See, e.g., Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 501 (1984) (Rule 52(a) does not prevent an appellate court from correcting "a finding of fact that is predicated on a misunderstanding of the governing rule of law"); *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963) ("[i]nsofar as [a] conclusion derive[s] from the court's application of an improper standard to the facts, it may be corrected as a matter of law"); *Postal Tel.-Cable Co.* v. *New Hope*, 192 U.S. 55, 63 (1904) (in rate cases, "the reasonableness of an ordinance is a matter of law for the court").

also huge beneficiaries of those operations. *See* Airline Br. 23-26. The inevitable result of this misallocation is that the Airlines are paying more than their fair share of those costs.

The Airport does not even attempt to defend this misallocation, and instead makes three unresponsive points. First, it asserts that this Court may not inquire into the reasonableness of its cost allocation because the District Court "found" that the Airport imposed only "break even" charges upon the Airlines. *See* Airport Br. 15, 31, 35. But the District Court's statement that the fees on the Airlines "break even" with the costs of the facilities used by them is an ultimate *legal* conclusion that begs the question whether those costs are fairly *allocated* among Airport users. If those costs are not allocated based on "some fair approximation of use"—and here they are not because none are allocated to concessions—then as a matter of law the Airlines are necessarily paying more than their "break even" share of those costs.[6]

Next, the Airport contends that the customer flow at the Airport is not created by the Airlines, but by the people of Grand Rapids. *Id.* at 43 n.27. Again, this begs the question. The indisputable fact is that the Airport expends significant costs on air-operations, and those costs in turn help produce a customer flow to *both* the Airlines and the concessions. Yet the concessions are allocated none of those costs. As a result, just as the Court of Appeals found it unreasonable for the Airport to allocate general aviation none of the costs of the crash, fire and rescue operations even though it receives a "substantial benefit" from those operations (J.A. 27), so too is it unreasonable for the Airport to ignore com-

[6] It is therefore not true, as the Airport repeatedly contends, that "the Airlines seek . . . to force the Airport to accept from the Airlines *less than the actual costs* of providing the Airlines with the facilities they use." Airport Br. 43 n.26. The Airport is entitled to *fully recover all* its costs, but it must fairly allocate those costs among the various users who benefit from them.

pletely the substantial benefits the concessions receive from the air operations.[7]

Finally, the Airport complains that it is being asked to give up its "compensatory" methodology of ratemaking (Airport Br. 33), that the Airlines seek to dictate precisely how it should assess its rates (*id.*), and that the Court is being asked to engage in complex cost-allocation calculations (*id.* at 48-49). On a contradictory note, the Solicitor General faults the Airlines for *failing* to demonstrate precisely how the Airport should allocate its costs. *See* U.S. Br. 24. None of this is correct and none of it is responsive to the simple legal contention being made.

The Airlines do not ask this Court to calculate an appropriate allocation of costs; nor were the Airlines required to do so themselves. Indeed, the Airlines agree that the Airport has discretion to choose from a wide range of permissible methodologies in allocating costs. The Airlines ask the Court to hold simply and only that a methodology is necessarily unreasonable where, as here, it makes no attempt whatsoever to fairly approximate user benefits because it allocates *no* airside costs to concessions.[8] Such a holding will not preclude airports from adopting "compensatory" methodologies; quite the contrary, it will ensure that the fees imposed under such methodologies fully compensate airports based on the relative benefits received by *all* airport users.

[7] Contrary to the Airport's contention (Airport Br. 48), allocating costs based on benefits is not novel or unduly complex. Rather, it is a standard method of cost accounting, and one that the federal government has recognized is necessary to fairly allocate costs to government contracts. *See* 48 C.F.R. § 31.201-4(b) (1992) (costs are to be allocated "in reasonable proportion to the benefits received"); C. Horngren & G. Foster, *Cost Accounting: A Managerial Emphasis* 460 (7th ed. 1991) (allocating costs according to benefits received is a standard cost-accounting criterion) (Prof. Horngren, a noted cost-accounting expert, testified for the Airlines at trial).

[8] As Judge Posner explained in *Indianapolis*, there is no "single valid method" of calculating fees, and no cause for a court to "tell [the Airport] what fees it must charge." 733 F.2d at 1270. Rather, the Court is being asked only to "invalidate an unreasonable rate," not to "fix the reasonable rate." *Id. See also Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 397-99 (1894).

B. The Airport Unreasonably Imposes Fees That Generate Substantial Excess Revenues

Under *Evansville*, user fees must not be "excessive in relation to the costs incurred by the taxing authorities." 405 U.S. at 719. Thus, as the Solicitor General acknowledges, "rates and charges should ordinarily correspond to the costs incurred in providing related facilities and services" and "revenues may not be accumulated indefinitely or in unlimited amounts." U.S. Br. 25, 27.[9] The Airport plainly violates these requirements, for it is indisputable that the Airport's fee methodology accumulates enormous surpluses for no purpose whatsoever.

In response, the Airport claims that the proposition that it is generating excessive revenues is "without any evidentiary support." Airport Br. 40. In fact, the undisputed trial testimony showed that the Airport is earning huge surpluses even accounting for *every* conceivable capital project it could imagine for the future.[10] And in any event, the Airport does not even attempt to refute the Airlines' contention that the AHTA does not allow it to

[9] The Solicitor General's own statement of the law belies his assertion (*see* U.S. Br. 26 n.14) that the Airlines have "seriously mischaracterize[d]" this Court's statement in *Evansville* that fees must not "do more than meet . . . past, as well as current, deficits." 405 U.S. at 720. Moreover, the Court clearly stated that the operative inquiry is whether "the funds received by local authorities . . . are . . . shown to exceed their airport costs" (*id.*), which is unquestionably true here.

[10] *See* Picardat Testimony at 847-58 (J.A. 130-38); Pederson Testimony at 774-77 (J.A. 123-26). Oddly, the Airport claims that its case is strengthened because it may now reap an additional $12,500,000 through "passenger facility charges." *See* Airport Br. 41. To the contrary, this new source of substantial revenue (whose statutory basis had not been enacted at the time of trial) demonstrates even more clearly the excessiveness of the Airport's fee methodology and the surpluses it creates.

charge users for the speculative costs of future facilities that may not even be built. *See* Airline Br. 36.

Because it is unable to deny or justify its creation of unreasonable surpluses from airport users, the Airport argues, alternatively, that its "surplus revenues" are generated at the expense of concession users, not the Airlines, and "[t]he Airlines thus have not been harmed by the Airport's accumulation of surplus . . . ." Airport Br. 40. Furthermore, the Airport says, airport users can choose not to patronize the concessions. *Id.* at 46.

None of this can validate the fees under the AHTA. The Airport does not—and cannot—dispute that the surpluses derived from concession fees *do* harm the Airlines because those surpluses are earned from the Airlines' passengers and therefore unreasonably increase the total costs of air travel—the precise evil the AHTA was designed to prohibit. *See* Airline Br. 30-34.[11] It is irrelevant whether some passengers might theoretically be able to cease patronizing concessions; for it is undisputed that they *are* in fact continuing to do so and are thereby funding the Airport's unreasonable surpluses. The fact that airport users choose to pay unreasonable fees does not make them any the less unreasonable.

Finally, the Airport claims that the Airlines improperly seek a "cross-credit" of all concession revenues that exceed the Airport's costs. *See* Airport Br. 43 & n.26.[12]

[11] The Airport asserts, without evidentiary support, that some concession revenue is earned from people other than airline passengers. *See* Airport Br. 44. However, it is undisputed—and the Airport in fact conceded below—that airline passengers constitute the vast majority of the concessions' customers. *See* Airline Br. 7 n.8; Airport Memorandum in Support of FRCP 56 Motion for Partial Summary Judgment 7 (R. 47).

[12] The Airport does not even attempt to defend its "carrying charges," which result in a recovery for the Airport of two to three times its capital expenditures and whose unreasonableness has nothing whatsoever to do with concession revenues. Contrary to the Airport's contention (*see* Airport Br. 36 n.21), the Airlines most certainly have disputed the Court of Appeals' holding that such charges are "reasonable." *See* Airline Br. 34-36.

This is not so. The Airlines simply ask this Court to set aside the Airport's fee methodology as unreasonable because it generates enormous surpluses from the Airlines and their passengers far in excess of the Airport's costs. If the Court does so, the Airport will thereafter be free to implement *any* methodology that allows it to be "self-sustaining" (49 U.S.C. App. § 2210(a)(9)) and to "meet . . . past, as well as current, deficits." *Evansville*, 405 U.S. at 720.

C. The Airport Unreasonably Discriminates in Favor of General Aviation

Finally, the Airport does not dispute that it discriminates against the Airlines in favor of general aviation, and in fact admits that "the Airport does not collect from general aviation users the full costs associated with their use of the airfield . . . ." Airport Br. 39.[13] Instead, it asks the Court to ignore this discrimination because, it claims, the Airlines do not compete with general aviation and would not benefit if general aviation were required to pay its fair share. *Id.* at 37-39.

These arguments cannot justify the Airport's blatant discrimination or make it any the less unjust. While the question of competition may in some instances be relevant under the Commerce Clause, the AHTA was intended to prohibit *all* unjust discrimination among users of airport facilities[14] including, specifically, discrimina-

[13] This distinguishes this case from *Evansville*, where the Court found that the differing charges imposed on commercial airlines and general aviation were rationally related to their differential use of airport facilities. *See* 405 U.S. at 718-19. Here, general aviation is charged only 20% of the costs that the *Airport itself* has allocated to it.

[14] All parties agree (*see* Airline Br. 29 n.33) that the AHTA's "reasonableness" requirement must be read in light of the Airport and Airway Improvement Act of 1982 ("AAIA"), which specifically requires that airports be "available for public use on fair and reasonable terms and without unjust discrimination . . . ." 49 U.S.C. App. § 2210(a)(1).

Similarly, the question whether the Airport's treatment of general aviation discriminates in favor of intrastate commerce, al-

tion in favor of general aviation.[15] Moreover, regardless of its competitive impact the Airport's discrimination *does* harm the Airlines, because the funds that now subsidize general aviation could otherwise be used for the general benefit of all Airport users. *See* Airline Br. 38.

III. THE AIRPORT'S FEES VIOLATE THE COMMERCE CLAUSE

The Court of Appeals held that in enacting the AHTA, Congress thereby intended to foreclose any Commerce Clause challenges to any airport fees—whether or not those fees are regulated or addressed by the AHTA. As the Airlines have explained (Airline Br. 40-43), that holding is flatly contrary to this Court's precedents.

The Airport does not, and cannot, show that in enacting the AHTA Congress "expressly stated" its "unmistakably clear" intent to foreclose all Commerce Clause review, as is required under this Court's precedents. *See id.* Rather, Congress enacted the AHTA to *strengthen* the Commerce Clause's prohibitions, not negate them. Thus, even if Congress intended to wholly exclude concession fees from the scope of the AHTA (which the Airlines dispute), it could not have intended thereby to eliminate the pre-existing limitations imposed on those fees by the Commerce Clause. And Congress certainly did not make any such intent "unmistakably clear."

Apparently recognizing that the AHTA does not contain the required express preclusion of Commerce Clause review, the Airport and the Solicitor General contend

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though relevant under the Commerce Clause, is not relevant under the AHTA. The Airlines submit that their separate discrimination claim under the Commerce Clause should be sustained on the current factual record. However, the District Court dismissed the claim summarily before trial, ruling that Congress had foreclosed any reliance on the Commerce Clause. Thus, if the Court reverses that ruling, the Airlines should have an opportunity to fully litigate that claim on the merits.

[15] *See* Senate Report at 17, 1973 U.S.C.C.A.N. at 1446 (*Evansville* "does not provide adequate safeguards to prevent . . . discriminatory taxation"); Airline Br. 37 & n.47.

instead that the federal grant assurance provisions (enacted most recently in the AAIA) manifest Congress' intent to foreclose such review. *See* Airport Br. 29 & n.16; U.S. Br. 21-22. But they cite nothing in those provisions manifesting that intent. This Court, moreover, rejected this contention in *Evansville*, holding that the AAIA's predecessor did *not* evidence Congress' intent to "deny or pre-empt state and local power" to impose user fees, provided the fees complied with the Commerce Clause. *Evansville*, 405 U.S. at 721.[16] Thus, just as the grant assurance statute did not preclude Commerce Clause review in *Evansville*, it does not do so here.

If the Court agrees with the Airlines that the Airport's fees are invalid under the AHTA, it need not reach the Commerce Clause claim. However, if the Court agrees instead with the Court of Appeals that the AHTA claim fails because concession fees may not be considered under that statute, it must then reach the constitutional claim. For the Airport does not—and cannot—dispute that concession fees *are* within the scope of the Commerce Clause. *See* Airline Br. 42. And, for the reasons earlier stated, when concession fees are taken into account the fees imposed on the Airlines plainly violate *Evansville*'s Commerce Clause standards.

IV. THIS COURT SHOULD REVIEW THE LEGALITY OF THE AIRPORT'S FEES

The Airport and the Solicitor General devote most of their briefs to contending that the Airlines have no cause of action to challenge the Airport's fees. It is submitted that this question is not properly before the Court, that even if it were the Court should decline to address it, and that, in any event, the Airlines clearly were entitled to challenge the Airport's fees in federal court.

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[16] Moreover, this Court has indicated that such intent *cannot* be implied from a statute—like the AAIA—that simply provides "regulations governing the expenditure of federal funds." *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984) (explaining holding of *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983)).

A. The Private Right of Action Issue is Not Properly Before the Court

The Airlines have already explained in detail why the private right of action issue is not properly before the Court.[17] Significantly, neither the Airport nor the Solicitor General has refuted the Airlines' contention that a cross-petition was jurisdictionally necessary to preserve that issue for review. Instead, they merely cite cases in which a respondent was permitted to defend a judgment on grounds that, if accepted, would *not* have expanded or modified the relief granted below.[18]

Moreover, the Solicitor General acknowledges that "the Court may of course decline to decide the issue and simply assume for purposes of this case that a cause of action exists." U.S. Br. 8 n.4. This is what the Court should do. For even if the Solicitor General prevailed on his view of the private right of action question, it is highly unlikely to affect the outcome of this case.

Thus, the Airport and the Solicitor General contend that this case—which has already received full consideration by the District Court and the Court of Appeals—must be sent back to the Secretary so that he might express his own views on the reasonableness of the Airport's fees. Thereafter, they contend that that legal determination would be subject, once again, to review by the Court of Appeals and then by this Court.

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[17] *See* Airline Br. 19-20 n.8; Petitioners' Opposition to Motion for Leave to Participate in Oral Argument. Although the Court has granted the United States' motion to participate in oral argument, it has not agreed to address the private right of action issue.

[18] *See* Airport Br. 22 n.11 (citing *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984) and *United States* v. *Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956)); U.S. Br. 8 n.4 (citing *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982) and *United States* v. *New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977)). In fact, the Solicitor General cites *Alexander* v. *Cosden Pipe Line Co.*, 290 U.S. 484 (1934), where the Court *refused* to allow the respondent to raise issues which were not presented in the petition for certiorari and upon which the petitioner had prevailed below. *Id.* at 487.

The Secretary, however, has already expressed his view that the decisions below "comport with this Court's prior decisions and are generally consistent with federal statutory law and policy." U.S. Br. 23. And the Solicitor General points to nothing in the Secretary's expertise that would assist in evaluating the legal questions now before the Court. Rather, the facts of this case are undisputed and all parties agree that the questions presented merely require application of the same three legal principles that this Court applied in *Evansville*. There is thus no reason to believe these proceedings would take a different course even if the Court were to hold that the AHTA affords no private right of action, and it would merely waste scarce judicial resources to require several more levels of repetitive litigation.[19] The Court should thus address only the issues presented in the petition.

B. The Airlines Have a Cause of Action Under the Anti-Head Tax Act

The Court of Appeals held that the Airlines have a private right of action under the AHTA (J.A. 17-18), a conclusion that has been reached, explicitly or implicitly, by every other court to have addressed the statute[20]—

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[19] Furthermore, as is explained below (*infra* at 18-20), if the Court elected to address whether the Airlines have a proper cause of action, it would need to address alternative bases for that action (the Supremacy Clause and Section 1983)—which provide the Airlines a cause of action even if the AHTA does not.

[20] *See, e.g.*, *Interface Group*, 816 F.2d at 15-16 (explicitly finding private right of action); *Indianapolis*, 733 F.2d at 1265-66; *City and County of Denver*, 712 F. Supp. at 836-41; *Rocky Mountain Airways*, 674 F. Supp. at 314-16 (explicitly finding private right of action); *Niagara Frontier Transp. Auth.* v. *Eastern Airlines, Inc.*, 658 F. Supp. 247, 249-51 (W.D.N.Y. 1987) (same); *Island Aviation, Inc.* v. *Guam Airport Auth.*, 562 F. Supp. 951, 960 (D. Guam 1982); *United Air Lines, Inc.* v. *County of San Diego*, 2 Cal. Rptr. 2d 212, 219-21 (Cal. Ct. App. 1991); *City of College Park* v. *Atlantic Southeastern Airlines, Inc.*, 391 S.E.2d 460 (Ga. Ct. App. 1990); *State Bd. of Equalization* v. *American Airlines, Inc.*, 773 P.2d 1033 (Colo.), *cert. denied*, 493 U.S. 851 (1989); *Republic Airlines, Inc.* v. *Department of Treasury*, 427 N.W.2d 182, 185-87 (Mich. Ct. App. 1988); *Airborne Freight Corp.* v.

including this Court on three separate occasions.[21] This unanimous conclusion is fully supported by the factors set forth in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). However, the AHTA was enacted in 1973, two years *before* this Court sharply modified its approach in *Cort*. As was held in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court "consistently found implied remedies" before 1975, and evaluation of statutes enacted in this period must therefore take into account Congress' understanding of that "contemporary legal context." *Id.* at 698-99.

1. Under the first *Cort* factor, there can be no dispute—and the Solicitor General in fact concedes—that the AHTA was enacted for the "especial benefit" of the Airlines and their passengers. *See* U.S. Br. 11 ("Congress intended to benefit airline passengers—and incidentally, we may assume, commercial air carriers—by prohibiting head taxes and requiring user fees imposed on aircraft operators to be 'reasonable' "). Indeed, 49 U.S.C. App. § 1513(b) expressly allows only reasonable fees upon "aircraft operators."

2. The second *Cort* factor, legislative history, even more clearly evidences Congress' intent to afford private actions. Congress enacted the AHTA specifically to *strengthen* the limitations recognized in *Evansville*, which

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New York State Dept. of Taxation and Fin., 527 N.Y.S.2d 107 (N.Y. App. Div. 1988); *Northwest Airlines, Inc.* v. *State*, 358 N.W.2d 515 (N.D. 1984); *State* v. *Cochise Airlines*, 626 P.2d 596 (Ariz. Ct. App. 1980); *Allegheny Airlines, Inc.* v. *City of Philadelphia*, 309 A.2d 157 (Pa. 1973).

[21] *See Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123 (1987); *Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1 (1986); *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7 (1983). Recognizing that this Court has routinely reviewed challenges to State taxes under the AHTA, the Airport argues that Congress intended to allow a private right of action to challenge taxes but not fees. *See* Airport Br. 24 n.12. This is absurd. There is no evidence that Congress intended to treat the "taxes" and "head charges" listed in § 1513(a) any differently from the "fees" or "other charges" listed in that same provision.

had involved direct airline challenges to airport charges under the Commerce Clause. *See* Senate Report at 17, 1973 U.S.C.C.A.N. at 1446 (*Evansville* "does not provide adequate safeguards to prevent undue or discriminatory taxation"). It would completely nullify this intent to interpret the AHTA as denying airlines the private right of action that Congress believed had been *too weak* in *Evansville*.

Accordingly, where, as here, Congress enacts a statute against the backdrop of a pre-existing private right of action, it presumably intended the statute to be enforced in the same manner. *See Cannon*, 441 U.S. at 694-99. As one court has explained:

> [T]he Anti-Head Tax Act was passed pursuant to Congress's powers under the Commerce Clause . . . . The airlines had standing to bring the [*Evansville*] action. The Senate report for the Anti-Head Tax Act cites the *Evansville* case as the impetus for the passage of the Act . . . . It seems unlikely, given all of the above, that Congress intended to revoke the airlines' standing to raise the proscriptions of the Commerce Clause, as codified in the Act.

Niagara Frontier, 658 F. Supp. at 251.

Moreover, after numerous decisions had either explicitly or implicitly allowed private rights of action under the AHTA (*see supra* nn. 20, 21), Congress twice amended the statute without expressing any disapproval of those decisions.[22] This "is itself evidence that Congress affirmatively intended to preserve that remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-82 (1982). Similarly, when Congress amended the AHTA in 1990 to permit "passenger facility charges," it expressly provided for administrative review and enforcement (49 U.S.C. App. § 1513(e)(11),

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[22] *See* Aviation Safety and Capacity Expansion Act of 1990, Pub. L. No. 101-508, tit. IX, §§ 9110, 9125, 104 Stat. 1388-357 (codified as amended at 49 U.S.C. App. § 1513(e), (f)); AAIA, Pub. L. No. 97-248, tit. V, § 532, 96 Stat. 701 (codified at 49 U.S.C. App. § 1513(d)).

(12)(C)), but specified no such limitations either for the pre-existing prohibitions in § 1513(a) or for a separate prohibition on State taxation that was newly-codified in § 1513(f). Thus, it cannot be presumed that Congress wished for the Secretary alone to police compliance with § 1513(a).[23]

3. A private right of action is also "consistent with the underlying purposes of the legislative scheme." *Cort*, 422 U.S. at 78. The underlying purpose of the AHTA was to *strengthen* the right of action the Court had already recognized in *Evansville*. In arguing otherwise, the Airport and the Solicitor General rely almost exclusively on the fact that Congress located the AHTA in a newly-created "miscellaneous" subchapter of the Federal Aviation Act of 1958 ("FAA"). But the legislative history shows that this location had nothing to do with the enforcement procedures of the FAA, which had been enacted 15 years before. Rather, Congress had simply asked legislative counsel to determine whether the AHTA should be codified in the FAA or in the statutes that governed the airport trust fund.[24] Counsel responded that it would be preferable to locate the AHTA in the FAA "in view of the fact that the Federal Aviation Act of 1958 is the Act under which the Federal Government exercises its authority under the Commerce Clause of the Constitution to regulate air transportation . . . ." *Id.* If anything, this demonstrates Congress' intent that the AHTA be enforced in the *same* manner as the Commerce Clause. And it certainly does not indicate that Congress intended thereby to preclude the judicial enforcement this Court had permitted in *Evansville*.

[23] *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citation omitted).

[24] *See* Senate Report at 25, 1973 U.S.C.C.A.N. at 1454 (referring to Airport and Airway Development Act and Airport and Airway Revenue Act).

Furthermore, relegating AHTA enforcement solely to the FAA's administrative procedures would also be inconsistent with Congress' intent to provide an *effective* prohibition on exactions that burden air commerce. The FAA's enforcement provision, 49 U.S.C. App. § 1487(a), allows only injunctive relief; thus, under that section a passenger or airline could not recover taxes or fees extracted by an airport in violation of the AHTA. By contrast, retrospective relief is available under the Commerce Clause, whose prohibitions Congress sought to strengthen. *See McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).[25]

Finally, the Airport and the Solicitor General assert that a private right of action under the AHTA would hamper the Secretary's parallel enforcement authority under the FAA and the AAIA, 49 U.S.C. App. § 2210(a)(1). *See* Airport Br. 25; U.S. Br. 18. This is simply not so. Unlike the AHTA, the AAIA applies

[25] The Solicitor General contends (*see* U.S. Br. 14) that because the general FAA enforcement provision, 49 U.S.C. App. § 1487(a), provides for a private right of action under a different provision of the FAA (§ 1371(a)), and because Congress did not amend § 1487(a) to specify the AHTA as well, Congress must have intended to exclude a private right of action under the AHTA. In fact, however, both when Congress enacted and amended the AHTA, courts had found numerous private rights of action under various provisions of the FAA (in addition to the AHTA itself). *See, e.g., Tallarico* v. *Trans World Airlines, Inc.*, 881 F.2d 566, 568-70 (8th Cir. 1989) (§ 1374(c)); *Bratton* v. *Shiffrin*, 635 F.2d 1228 (7th Cir. 1980), *cert. denied*, 449 U.S. 1123 (1981) (§ 1371(n)(2)); *Nader* v. *Allegheny Airlines, Inc.*, 512 F.2d 527, 537 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976) (§ 1374(b)); *Archibald* v. *Pan American Airways, Inc.*, 460 F.2d 14, 16 (9th Cir. 1972) (same); *Fitzgerald* v. *Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956) (prior codification of § 1374(b)); *Gabel* v. *Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972) (safety requirements); *Mortimer* v. *Delta Air Lines*, 302 F. Supp. 276 (N.D. Ill. 1969) (§ 1374(b)); *Town of East Haven* v. *Eastern Airlines, Inc.*, 282 F. Supp. 507, 513 (D. Conn. 1968) (safety requirements). This belies the contention that Congress intended for § 1487(a) to be the exclusive enforcement mechanism for each and every provision of the FAA.

only to airports receiving federal funds and its remedies are limited to withholding those funds. *See* 49 U.S.C. App. § 2218(b) (1988). As this Court has explained, such federal funding provisions are no substitute for private actions. *See Cannon*, 441 U.S. at 704-06. This is especially so given that Congress enacted the AHTA in response to this Court's holding that the precursor to the AAIA was *not* a sufficient prohibition on airports. *See Evansville*, 405 U.S. at 721. In addition, denying private actions would not foster more "uniformity" in the interpretation of the AHTA. *See* U.S. Br. 18. Under the FAA, review of the Secretary's decisions is available in each circuit court (*see* 49 U.S.C. App. 1486(a)); thus, the circuit split that now exists would continue even if enforcement of the AHTA were relegated solely to the FAA. In fact, the only way to achieve uniformity is for this Court to resolve the current conflict now.[26]

For all these reasons, the Court of Appeals correctly held that the Airlines have a private right of action under the AHTA.[27]

C. The Airlines Have a Cause of Action Under the Supremacy Clause and 42 U.S.C. § 1983

Regardless whether the AHTA affords a private right of action, the Airlines have a cause of action to challenge the Airport's fees for at least two other reasons.

First, the Airlines were entitled to bring an action under the Supremacy Clause to invalidate the Airport's fees on federal preemption grounds. The AHTA is simply an express preemption provision directed at States and their

[26] Moreover, the Secretary historically has expressed little interest in the reasonableness of airport fees. Indeed, the Solicitor General identifies only a single case where the Secretary has considered an AHTA claim, *see New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989), and that claim was merely an adjunct to claims under the AAIA.

[27] The fourth *Cort* factor—whether the issue should be left to state law—is plainly not implicated here.

political subdivisions. Accordingly, the Airlines have properly sought an injunction against respondents (who are public entities) on the grounds that their fee ordinance is preempted by the AHTA. As this Court has held, federal courts always have the authority to hear preemption challenges under the Supremacy Clause.[28] And as the Solicitor General notes, the Court has already decided three cases "raising preemption claims under the AHTA." U.S. Br. 10-11 n.5 (citing cases).

Second, the Airlines were in any event entitled to bring an action under 42 U.S.C. § 1983 for the Airport's violation of the AHTA.[29] Section 1983 provides a cause of action against state instrumentalities for their violation of federal statutes irrespective of whether those statutes also directly afford a private right of action. *See Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 508-09 n.9 (1990). Unless Congress has expressly stated otherwise, § 1983 provides a cause of action for violation of a federal statute if the statute (1) " 'was intend[ed] to benefit the putative plaintiff' "; (2) is a "binding obligation on the governmental unit"; and (3) is not " 'beyond the competence of the judiciary to enforce.' " *Id.* at 509 (citations omitted).

Here, Congress has not expressly foreclosed § 1983 suits for violation of the AHTA. It is also indisputable that the AHTA was intended to benefit the Airlines, and is binding upon states and localities. Finally, there is no question that the AHTA is within the competence of the judiciary to enforce. Indeed, in *Evansville* this Court

[28] *See Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). *Accord, Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256, 259 n.6 (1985). *See also Western Air Lines, Inc.* v. *Port Auth.*, 817 F.2d 222, 225-26 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) (even when aviation statute affords no private right of action, airline may sue under Supremacy Clause to challenge local regulation that violates statute).

[29] This Court may consider this argument even though the Airlines did not present it below. *See Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981).

had no difficulty applying the same factors that all parties have agreed should be applied under the AHTA.[30]

Therefore, even if the Court reaches the cause of action issue in this case it should conclude that the Airlines were entitled to bring this suit.

CONCLUSION

For the foregoing reasons, and those presented in petitioners' opening brief, the judgment of the Court of Appeals should be reversed and the case remanded for consideration of petitioners' damages and other appropriate relief.

Respectfully submitted,

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[30] *See also Wilder*, 496 U.S. at 519 (that a statute "gives the States substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a court reviews whether the rates comply with the [statute], but it does not render the [statute] unenforceable by a court").